87-284

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF TEXAS, *Petitioner*

v.

RODNEY GENE BROADWAY, *Respondent*

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

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QUESTIONS PRESENTED

1. Is the failure to observe the procedural guidelines of *Pate v. Robinson*, 383 U.S. 375 (1966), subject to harmless error analysis, and, if so, what form should that analysis take?

2. If a *Pate* violation is established, may evidence of harmlessness be developed through events occurring after trial?

3. If respondent is entitled to relief, should it be limited to a retrospective competency hearing rather than a new trial?

4. Is respondent's post-conviction *Pate* complaint barred by the failure of his competent trial counsel to object at trial to the absence of a separate competency hearing?

LIST OF PARTIES

The only parties to the proceedings below were petitioner, The State of Texas, and respondent, Rodney Gene Broadway.

The Criminal District Attorney of Tarrant County, Texas, is the proper legal representative of petitioner in this case. Respondent was convicted in district court in Tarrant County in 1966, and his conviction was affirmed on appeal. *Broadway v. State*, 418 S.W.2d 679 (Tex. Crim. App. 1967). In late 1986 he filed a post-conviction petition for writ of habeas corpus in the same district court, and the Court of Criminal Appeals granted relief in the form of a new trial. The petition seeks review of this latter judgment.

The Criminal District Attorney of Tarrant County and his assistants represent the State of Texas in all criminal cases in the Tarrant County district courts, in appeals of those cases, and in all habeas corpus cases involving criminal proceedings. Tex. Const. Ann. art. V, § 21; Tex. Code Crim. Proc. Ann. art. 2.01; Tex. Govt. Code Ann. §§ 41.101-41.103. The Criminal District Attorney "shall represent Tarrant County in *any* court in which the county has pending business." Tex. Govt. Code Ann. § 44.320(a) (emphasis added). Clearly the present petition amounts to pending business of Tarrant County: The prior work on respondent's trial, appeal, and habeas corpus petition has been done by the Criminal District Attorney through his assistants, all of whom have been employees of Tarrant County, and he and his assistants will also be responsible for the re-prosecution of respondent if the judgment of the Court of Criminal Appeals remains undisturbed. See also, *State v. Gary*, 359 S.W.2d 456, 458 (Tex. 1962); *Sheppard v. Alaniz*, 303 S.W.2d 846, 848-850 (Tex. Civ. App. 1957, no writ); *Baker v. Wade*, 769 F.2d 289, 291-292 (5th Cir. 1985) (opin. on reh.), *cert. denied*, 106 S.Ct. 3337 (1986).

Also, the Criminal District Attorney and his assistants have previously represented the State of Texas before this Court under similar circumstances. *Texas v. Brown*, 460 U.S. 730 (1983).

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No. _____

IN THE

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OCTOBER TERM, 1987

THE STATE OF TEXAS, *Petitioner*

v.

RODNEY GENE BROADWAY, *Respondent*

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the Court of Criminal Appeals of Texas in the case of Ex parte Rodney Gene Broadway, number 69,836 in the court below, which granted respondent post-conviction habeas corpus relief.

OPINION BELOW

The opinion of the Court of Criminal Appeals was not officially reported. It is reproduced in the Appendix.

JURISDICTION

The Court of Criminal Appeals rendered its decision granting respondent habeas corpus relief on June 17, 1987. No motion for rehearing was filed. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

Amendment XIV, Section 1, of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Penal Code Annotated, Article 34 (Vernon Supp. 1966):

No act done in a state of insanity can be punished as an offense. No person who becomes insane after he committed an offense shall be tried for the same while in such condition. No person who becomes insane after he is found guilty shall be punished while in such condition; however the time he is confined in a State mental hospital for treatment may be considered time served and may be credited to the term of his sentence.

STATEMENT OF THE CASE

In October 1966, a jury found respondent guilty of rape and determined that he was sane at the time of the offense. The jury also concluded respondent was sane at the time of trial, i.e., that he was competent to stand trial. See, *Pate v. Robinson*, 383 U.S. 375, 384-385, n. 1. (1966). All three issues — guilt-innocence, sanity at the time of the offense, and compe-

[1]Two other statutory provisions are found in the appendix because of their length. They are Tex. Code Crim. Proc. Ann. art. 11.07, §§ 2-3 (Vernon Supp. 1986), and Tex. Code Crim. Proc. Ann. art. 46.02, §§ 1-2 (Vernon 1966). See, SUP. CT. R. 21.1(f).

tency to stand trial — were before a single jury at the same time, and all were embodied in a single court's charge, although the two state-of-mind issues were set out in a separate part of the charge. R. I-58-61, 62-70. Respondent's conviction was affirmed on appeal. *Broadway v. State*, 418 S.W.2d 679 (Tex. Crim. App. 1967).

In December 1986, respondent filed his petition for writ of habeas corpus in the convicting court. Tex. Code Crim. Proc. Ann. art. 11.07, § 2(b) (Vernon Supp. 1986). He contended that he had not been given a separate competency hearing at the time of his 1966 trial and that the jury instruction on competency was not constitutionally valid. Petitioner answered respondent's petition. In accord with subsection 2(d) of article 11.07, *supra*, evidence was developed. The convicting court then made detailed findings of fact, which are reproduced in the Appendix.

On June 17, 1987, the Court of Criminal Appeals granted relief as to respondent's first contention: It held that the denial of a separate competency hearing deprived respondent of due process, and it ordered that he be "remanded to the custody of the sheriff of Tarrant County to answer the indictment"—that is, it ordered a new trial. The Court of Criminal Appeals did not address respondent's other contention, concerning the competency charge, and it is not before the Court for review.

How The Federal Questions Were Presented

The Court of Criminal Appeals did not address the federal questions petitioner presents, although each was properly presented to that court and the trial court as well.

The constitutional claims in this case were first raised in the trial court. In his habeas petition respondent relied on due process and *Pate* for his claim that he had not received a separate competency hearing. R. I-4. Petitioner filed a timely

answer, accompanied by the full record from petitioner's 1966 trial. In the answer petitioner asserted the following defenses: that a retrospective competency hearing was possible and was the maximum relief respondent was entitled to; that the writ should not be entertained because of the long delay in its filing[2] and because in 1975 respondent absconded from parole; and that any relief not be granted automatically but be determined by an examination of the evidence. R. I-32-36.

In accord with section 2(d) of article 11.07, the trial court concluded that there were controverted, previously unresolved facts material to the case and ordered that the parties submit to the Court any proper documents relevant to the issues in the case. R. I-275-276. Subsequently, and with the express permission of the trial court, petitioner filed two supplemental answers to the habeas petition. R. I-309-311, 465-466; R. II-28. In the first supplement, petitioner contended that any *Pate* error in failing to hold a separate competency hearing was harmless beyond a reasonable doubt because of the overwhelming evidence of respondent's competence at the time of trial. Petitioner also alleged that this evidence appeared within the trial record as well as outside it. R. I-310. In the second supplemental answer, petitioner contended that by failing to object at trial respondent had waived his right to complain of both the *Pate* error and the court's charge on competency; that the charge complied with due process requirements; and that there was no bona fide doubt about respondent's competence by the close of evidence at trial. R. I-465. Petitioner supported all of its allegations with documentary evidence presented to the court and made a part of the record.

Petitioner embodied all of its federal contentions in proposed findings of fact and conclusions of law. R. I-517-524. Petitioner re-urged and argued its federal contentions in a

[2]Petitioner cited *Vasquez v. Hillery*, 106 S.Ct. 617, 624 (1986), and sought to distinguish it.

brief filed in the Court of Criminal Appeals approximately three weeks before that Court issued its opinion — even though no such brief is required by that court or by Texas law, the record compiled in the trial court forming the basis on which the Court of Criminal Appeals grants or denies a writ. See, art. 11.07, *supra*, §§ 2(c), 2(d), 3.

The opinion of the court below relies on federal law. It speaks of "the due process clauses of the State and federal constitutions;" it relies on *Pate*; and it does not contain a plain statement of reliance on adequate and independent state law grounds. App. 1-2. See, *Michigan v. Long*, 463 U.S. 1032, 1037-1044 (1983). This reliance on federal law comports with the prior holdings of the Court of Criminal Appeals, which has consistently relied on *Pate* and federal due process for its conclusion that a separate competency hearing is required. *Morales v. State*, 427 S.W.2d 51, 53-54 (Tex. Crim. App. 1968); *Townsend v. State*, 427 S.W.2d 55, 57 (Tex. Crim. App. 1968); *Ex parte Locklin*, 583 S.W.2d 787, 788-789 (Tex. Crim. App. 1979). See, *Texas v. Brown*, 460 U.S. 730, 732-733, n. 1 (1983). Indeed, the Court of Criminal Appeals noted that the respondent's competency hearing was held in accord with the state statutory law existing at the time. App. 1.

As noted, the case has been remanded for re-trial, not for a possible retrospective competency hearing. The competency issue will therefore not again be litigated in its present form. Thus, the case is final for purposes of 28 U.S.C. § 1257(3). *New York v. Quarles*, 467 U.S. 649, 651, n. 1 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975).

For all of the foregoing reasons, petitioner's federal contentions are properly before this Court. See, *Illinois v. Gates*, 462 U.S. 213, 221 (1983).

Facts Pertinent to the Issue of Competency

In October 1966, seven and a half months after the decision in *Pate v. Robinson*, 383 U.S. 375 (1966), respondent was tried by a jury for the offense of rape. At the beginning of trial, in accord with Texas law in effect at the time, respondent's counsel raised the issues of insanity at the time of the offense and "present insanity," that is, incompetency to stand trial. Tex. Code Crim. Proc. Ann. art. 46.02, § 2 (Vernon 1966);[3] *Townsend v. State*, 427 S.W.2d at 61. Article 46.02 provided that these issues were generally to be tried along with the questions of guilt and innocence; only if the defendant made a special request for a separate hearing of an "issue of insanity" was either mental issue to be tried separately, and then only with the prosecutor's consent and the trial judge's approval. Art. 46.02, *supra*, §§ 1, 2. Respondent's counsel made no request for a separate hearing and none was held. Nor did counsel ever object to the joined proceedings.

The entirety of respondent's evidence on the two "issues of insanity" came from Dr. H. Leake McCauley, a psychiatrist who is now dead. R. I-177-190, 308. On direct examination Dr. McCauley testified that he had interviewed respondent four months earlier and had also utilized the evaluations made by a psychologist and another psychiatrist. R. I-182-185. Dr. McCauley then testified that respondent was insane at the time of the offense and at the time of trial. R. I-189-190. He based this conclusion solely on his determination that respondent was mentally deficient — his "intellectual ability is compromised . . . especially when he is under a great amount of stress and strain." R. I-186-188.

However, on cross-examination Dr. McCauley retreated from his sweeping conclusion that respondent was insane at

[3]Article 46.02 has been significantly amended. Tex. Code Crim. Proc. Ann. art. 46.02 (Vernon 1979 and Supp. 1987).

all pertinent times. He testified that respondent *was* competent to stand trial, that is, that he was sane "as he sits here today." R. I-200-201. Dr. David Muller, a psychiatrist called by the state, also testified that respondent was competent to stand trial. R. I-217. The jury found respondent sane at the time of trial and at the time of the offense, and, at the same time, found him guilty of rape.

On appeal respondent made no complaint about the competency determination. *Broadway v. State*, 418 S.W.2d 679 (Tex. Crim. App. 1967).

While in prison respondent took I.Q. tests on three occasions between 1967 and 1986. The results of the tests demonstrate that his intelligence was in the center of the average intelligence level for the population as a whole, as do the results of the G.E.D. examination he passed while in prison. R. I-355-356, 430-432. After obtaining his G.E.D., respondent took junior college courses and obtained his Associate in Arts degree. R. I-357-359. He also scored well enough on educational achievement tests to place well above the average for the Texas prison population. R. I-430. The record contains an affidavit from an experienced forensic psychologist, Dr. Swen Helge, in which he states that it is possible to extrapolate back in time from respondent's test scores and college grades. By means of this extrapolation, Dr. Helge was able to conclude with reasonable psychological certainty that respondent was functioning in October 1966 with no less than average intelligence. R. I-431-432.

In his findings of fact the trial court specifically found that respondent was represented by competent counsel at his trial. App. 4. He also found that the evidence at trial clearly established that respondent was competent to stand trial, as did the records and activity of respondent after trial. App. 5. The court also found that a retrospective competency hearing was possible at the present time. App. 6. In its opinion the Court

of Criminal Appeals did not in any way dispute or "re-find" these or any of the other fact findings. App. 1-2. Compare, *Ex parte Blume*, 618 S.W.2d 373, 374 (Tex. Crim. App. 1981) (trial court's findings rejected by appellate court).

REASONS FOR GRANTING THE WRIT

I

THE COURT OF CRIMINAL APPEALS OF TEXAS HAS DECIDED THE FEDERAL QUESTION OF HARMLESS DUE PROCESS ERROR IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Court of Criminal Appeals has refused to acknowledge that the failure to hold a separate competency hearing may be harmless constitutional error.

Petitioner contends that the failure to afford a criminal defendant a separate *Pate* hearing can be harmless constitutional error. See generally, *Chapman v. California*, 386 U.S. 18 (1967). In *Rushen v. Spain*, 464 U.S. 114, 117-118, n. 2 (1983), this Court indicated that a deprivation of procedural due process could be harmless error.[4] And in *Rose v. Clark*, 106 S.Ct. 3101 (1986), the Court held that one type of due process error could be harmless under *Chapman*. See, 106 S.Ct. at 3104-3105, n. 3; *Sandstrom v. Montana*, 442 U.S. 510, 523-524 (1979). Moreover, as petitioner contended in the courts below, harmlessness is shown when the State establishes beyond a reasonable doubt that the finding of competency was substantively justified. This is in accord with such cases as *Carey v. Piphus*, 435 U.S. 247, 263-267 (1978). The failure of the Texas Court of Criminal Appeals to consider these issues is thus in conflict with the pertinent decisions of this Court.

[4]However, see the concurring opinion of Mr. Justice Stevens, 464 U.S. at 126, n. 6.

It is clear that *Pate* deals with *procedural* due process under the Fourteenth Amendment. 383 U.S. at 378, 386. And although this Court appears not to have said so explicitly, the procedures approved in that case are just as clearly intended to protect the defendant's *substantive* due process right not to be criminally prosecuted while incompetent. *Id.*, at 378. See, *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975); *Bishop v. United States*, 350 U.S. 961 (1956). Accord: *Acosta v. Turner*, 666 F.2d 949, 954 (5th Cir. 1982); *State v. Bertrand*, 465 A.2d 912, 914 (N.H. 1983). This substantive right is a liberty interest under the Fourteenth Amendment and hence can be created by the Constitution as well as state law.[5] *Drope*, 420 U.S. at 171-172; *Hewitt v. Helms*, 459 U.S. 460, 466 (1983). Cf. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (Federal Constitution does not create property interests protected by procedural due process). See also, H. Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405 (1977).

However, this Court has recently emphasized that procedural due process is independent of the substantive rights being protected: "The categories of substance and procedure are distinct." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). And this is true regardless of whether the interest being protected is life, liberty, or property. *Id.*

Accordingly, the Court has held that the Fourteenth Amendment does not require a procedural remedy where there has been no deprivation of a protected liberty interest. *Davidson v. Cannon*, 106 S.Ct. 668, 670 (1986). The Court has also held that "[w]here the deprivation of a protected interest

[5]In fact, the interest was also created by State law. Article 34 of the Texas penal code that was in effect during respondent's trial created the same substantive due process interest. It prohibited the trial of anyone who became insane after he committed a criminal offense. See, *Townsend v. State*, 427 S.W.2d at 58, 63.

is substantively justified but procedures are deficient in some respect," the injury caused by the deficiency is often minimal and sometimes only hypothetical. *Carey v. Piphus*, 435 U.S. at 263-264. In a suit for damages arising from such a claim, the injured party is entitled to recover only nominal damages not to exceed one dollar. *Id.* at 266-267; *Hughes v. Rowe*, 449 U.S. 5, 14, n. 12 (1980).

Petitioner contends that the approach of *Davidson* and *Carey* to deficiencies in procedural due process is the equivalent of the harmless error rule in criminal cases. See, *Rose v. Clark*, *supra*; *Rushen v. Spain*, 464 U.S. at 117-118, n. 2. See also, *Chapman v. California*, 386 U.S. at 22; *Schneble v. Florida*, 405 U.S. 427, 430 (1972); *United States v. Hasting*, 461 U.S. 499, 507-509 (1983). The Court should grant the petition to address this issue in the context of the more specific issue of the applicability of the harmless error rule to *Pate*'s procedural due process requirements. This is an especially appropriate case for addressing the issue because the decision of the Texas court is so clearly in conflict with *Chapman*'s express rejection of the notion that constitutional error is always reversible regardless of harm. 386 U.S. at 21-22. That court has consistently followed the path it took in this case: Upon discovering that competency was tried together with guilt-innocence, it has ordered a new trial without regard to harm. E.g., *Ex parte Locklin*, 583 S.W.2d at 791. The Court should grant the petition to address this conflict.

B. The Court should grant the petition to decide what factors are to be considered in determining harmless error under *Pate v. Robinson*.

This Court has always insisted that the harmless error rule will not apply unless the error is determined to be harmless beyond a reasonable doubt. E.g., *Chapman v. California*, 386 U.S. at 24; *Schneble v. Florida*, 405 U.S. at 428; *United States*

v. Hasting, 461 U.S. at 508-509. However, the Court has not been so consistent in determining what specific factors will be emphasized in deciding whether a particular type of constitutional error is harmless beyond a reasonable doubt.

In *Chapman*, for example, the prosecutor's arguments about the defendants' failure to testify were not harmless because the Court concluded there was a reasonable possibility they might have contributed to the conviction. 386 U.S. at 24-26. In *Schneble*, a violation of *Bruton v. United States*, 391 U.S. 123 (1968), was harmless because the improperly-admitted confession of the co-defendant would not have affected the minds of an average jury in such a way as to make the State's case significantly more persuasive. 405 U.S. at 432. In *Hasting*, the Court emphasized the overwhelming evidence of guilt in holding that a prosecutor's improper argument was harmless. 461 U.S. at 512. In *Rushen v. Spain*, 464 U.S. 114, 116-122, an *ex parte* communication between a juror and the trial judge was harmless because it did not affect the impartiality of the juror or the rest of the jury. And in *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1438 (1986), the error in denying a defendant the right to cross-examine a witness for bias was deemed harmless on the basis of "a host of factors" germane to that particular constitutional right.

The opinion in *Van Arsdall* thus explains the lack of uniformity in these harmless error cases: The determinative factors in any analysis of harm should be pertinent to the particular constitutional deprivation being assessed. 106 S.Ct. at 1438.

At least some of the factors relevant to deciding whether *Pate* error is harmless can be found in the Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). There the Court identified three factors to be evaluated in determining how much procedural due process is required in a particular situation: the private interest, the governmental interest, and the

value of additional procedural safeguards in light of the risk of erroneous deprivation of the private interest through the procedures used. 424 U.S. at 334-335. Accord: *Hewitt v. Helms*, 459 U.S. at 473; *Ake v. Oklahoma*, 470 U.S. at 68, 77 (1985). "At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews v. Eldridge*, 424 U.S. at 348, quoted in *Ingraham v. Wright*, 430 U.S. 651, 682 (1977).

The Court's opinion in *Carey v. Piphus*, 435 U.S. at 263-264, is helpful in locating that point for purposes of determining harmless *Pate* error. If it can be concluded beyond a reasonable doubt that the finding of competency was "substantively justified" in a given case, the failure to hold a separate hearing on the issue should be deemed harmless. 435 U.S. at 263. See also, *Rose v. Clark*, 106 S.Ct. at 3108. That is, if the facts of the particular case establish beyond a reasonable doubt (1) that the determination of the defendant's competency was unaffected by the absence of a separate hearing; (2) that the burdens on the state were heavy, or will be if a new trial is ordered; and (3) that the risk of an erroneous determination of the defendant's competency was minimal or non-existent and a separate hearing would not have changed the result; then the error can be labeled harmless. *Mathews v. Eldridge*, 424 U.S. at 335. See also, *Ake v. Oklahoma*, 470 U.S. at 77.

The Court should grant the petition to determine that these factors are appropriate when a reviewing court is deciding whether *Pate* error is harmless.

C. The petition should be granted to decide whether facts developed after trial can be utilized in the determination of harmless *Pate* error.

If a criminal defendant does not raise a federal claim until after he is convicted, the State should be allowed to utilize evi-

dence that also develops after conviction in its effort to show that the federal claim is without merit and that the error is harmless. Specifically, if respondent claims that he did not receive all of the procedural protection offered by *Pate v. Robinson*, the State should be entitled to show the invalidity of the underlying substantive due process interest by introducing evidence that developed after trial. That evidence should be considered in assessing harm.

To the extent that respondent presented a substantive claim that he was incompetent, he did so solely through the direct examination of a psychiatrist who said respondent's low intelligence rendered him insane.[6] In his post-conviction habeas corpus petition he claimed that the lack of a separate competency hearing deprived him of due process. To refute this claim the State introduced into the record documentary evidence showing that the respondent's intelligence was definitely not low. This evidence came principally from records of the Texas Department of Corrections, where respondent was incarcerated after his conviction.

Of course, respondent's prison records did not exist at the time of trial. In the ordinary case, a criminal conviction is on direct appeal and the reviewing court looks at the trial record to determine whether a given error was harmless. E.g., *United States v. Hasting*, 461 U.S. at 509-510; *Schneble v. Florida*, 405 U.S. at 430-432; *Harrington v. California*, 395 U.S. 250, 254 (1969).

This is not an ordinary case. Respondent lost his direct appeal and waited twenty years after trial to make his initial claim that *Pate* was violated. Of course, the delay does not bar the claim. *Vasquez v. Hillery*, 106 S.Ct. at 624. However, petitioner contends that relevant events occurring during the

[6]However, the witness stated on cross-examination that respondent was not insane as he sat in the courtroom.

period of delay should be considered in gauging the harm caused by the *Pate* violation and in determining the validity of respondent's due process claim. Support for this contention comes from *Drope v. Missouri*.

In *Drope*, the Court addressed a state trial court's failure to order a psychiatric examination of the defendant. In the course of the post-trial collateral attack on Drope's conviction the trial court heard relevant testimony on the issue from two psychiatrists. 420 U.S. at 169. The weight and effect to be given this testimony was a question this Court addressed at two different points in its opinion — and seemingly in two different ways.

In footnote 17 of its opinion, 420 U.S. at 181-182, the Court stated that this testimony was "not relevant to the question before us" — the question being whether the trial court should have ordered a mid-trial psychiatric examination. 420 U.S. at 179. However, in another part of the opinion the Court evaluated the post-conviction record to see if it revealed that the Missouri Courts had failed "to give proper weight to the information suggesting incompetency which came to light during trial." 420 U.S. at 179. In making this examination, the Court appears to have *relied* on the post-trial psychiatric testimony. 420 U.S. at 179-180, n. 15.

What this seemingly inconsistent analysis of the post-trial psychiatric testimony suggests is that such testimony is not logically relevant to an evaluation of the correctness of the trial court's conduct in the middle of trial. However, it is relevant to an analysis of the post-conviction decisions made by the state courts when *they* were evaluting what the trial court should, in retrospect, have done.

To some extent this only restates the obvious — that a trial court cannot see the future but a reviewing court does examine the past. Yet it has a significance for this case and due pro-

cess analysis generally. For if the concern is the process the defendant received rather than a particular piece of testimony the jury heard, the harmless error rule should allow the parties and courts to go outside the evidence presented to the jury to determine the effect of the acknowledged procedural deprivation. The issue should be whether the substantive due process right was vindicated despite the procedural deprivation, not whether the jury received or failed to receive certain evidence. *Carey v. Piphus*, 435 U.S. at 263-264; *Schneble v. Florida*, 405 U.S. at 428-429; *Delaware v. Van Arsdall*, 106 S.Ct. at 1433-1434.

Thus, *Drope* suggests that events occurring after trial can be utilized as part of a determination of harmless *Pate* error. Additional support for this conclusion can be found in *Maggio v. Fulford*, 462 U.S. 111 (1983). In reviewing a federal habeas corpus claim that a state trial judge should have ordered a competency hearing, the Court relied on evidence of competency that did not develop until after trial. 462 U.S. at 114, n. 3.

Similarly, in *Rushen v. Spain*, 464 U.S. at 116, 117-118, n. 2, the evidence from a post-verdict hearing was utilized to show that federal constitutional error, most likely due process error, was harmless. Cf. *Ponte v. Real*, 471 U.S. 491, 497-498 (1985) (prison officials may wait until after a disciplinary hearing is concluded to explain their refusal to allow witnesses to testify at the hearing).

It therefore appears that the decision of the court below conflicts with this Court's opinions in *Drope*, *Maggio*, and *Rushen*. The Court should accordingly grant the petition to determine whether evidence developed after trial can be used to assess the prejudicial effect of error in the failure to give respondent a separate competency hearing.

D. The facts of respondent's case clearly demonstrate the application of the harmless error rule to the failure to hold a separate competency hearing.

Respondent's own psychiatrist, Dr. McCauley, testified on cross-examination that respondent was competent as he sat in the courtroom, and the State's expert psychiatric witness agreed that he was competent to stand trial. The only evidence to the contrary was Dr. McCauley's blanket statement on direct, which he effectively recanted on cross-examination. There was no re-direct examination of Dr. McCauley.

Also, respondent's claim of incompetency was based solely on his supposed low intelligence, yet the habeas corpus record shows without dispute that he was functioning at the time of trial with no less than average intelligence. In the years immediately following his trial, he took and passed the G.E.D. examination with scores indicative of average intelligence, and he took enough college courses to obtain an Associate in Arts degree. His I.Q. scores also refute his contention of incompetence based on low intelligence.

The failure to provide respondent with a separate competency hearing was harmless error under these circumstances. The jury finding of competency was substantively justified beyond a reasonable doubt; it would not have been affected by the use of a separate jury. The future burdens on the State of Texas will be significant—not only a re-trial, but re-trial after more than twenty years, with the attendant loss of memory and even of witnesses. One takes no risk in concluding that an erroneous determination of respondent's competency simply did not occur. The failure to hold a separate competency hearing was harmless beyond a reasonable doubt.

Thus, respondent's case presents a distinctive opportunity for the Court to address the issue of harmless error in *Pate* proceedings and hence in all criminal cases where the proce-

dures required by due process are in some way deficient. By failing to consider the case in this light the Texas court placed itself in conflict with *Rose v. Clark*, 106 S.Ct. at 3104-3109; *Rushen v. Spain*, 464 U.S. at 117-118, n. 2; *Carey v. Piphus*, 435 U.S. at 263-267; and *Davidson v. Cannon*, 106 S.Ct. at 670.

II

IN DECIDING THAT RESPONDENT WAS ENTITLED TO A NEW TRIAL RATHER THAN A RETROSPECTIVE COMPETENCY HEARING, THE COURT OF CRIMINAL APPEALS DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

As petitioner has shown, there was only a *de minimis* violation of procedural due process in respondent's case. The jury verdict finding him competent was substantively justified beyond a reasonable doubt. If this were a civil claim for damages, respondent would only be entitled to nominal damages not to exceed one dollar. *Carey v. Piphus*, 435 U.S. at 266-267. *Hughes v. Rowe*, 449 U.S. at 14, n. 12.

However, the remedy fashioned by the Texas court is to remand for a new trial on all issues. App. 2. Accord: *Ex parte Locklin*, 683 S.W.2d at 789-791. This is disproportionate in the extreme, both with regard to the result in civil cases and to the actual impact of the *Pate* violation on respondent's 1966 trial. The proper remedy is to order that the State writ be denied because the error was harmless beyond a reasonable doubt. As an alternative, petitioner contends respondent should now be given a hearing on his competency to stand trial in 1966; this is the most relief he is entitled to.

Petitioner is aware that because of their "inherent difficulties" such retrospective hearings have not previously found

favor in this Court. *Drope v. Missouri*, 420 U.S. at 183; *Pate v. Robinson*, 383 U.S. at 386-387; *Dusky v. United States*, 362 U.S. at 403. However, this case is free of those difficulties. All of the testimony from the previous trial is available, and the psychiatrist who testified for the State is not only available—he remembers his 1966 psychiatric evaluation of respondent and is currently able to testify as to respondent's competency in 1966. R. I-295. In light of these facts and the substantive insignificance of the *Pate* violation, a retrospective competency hearing is a proper alternative to denying respondent relief altogether.

The Court should grant the petition to consider the disproportionality of the remedy ordered by the Court of Criminal Appeals. That remedy is at odds with this Court's holding in *Carey v. Piphus* and *Hughes v. Rowe*.

III

THE COURT OF CRIMINAL APPEALS HAS DECIDED THE FEDERAL QUESTION OF WAIVER IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In *Pate v. Robinson*, 383 U.S. at 384, the State argued that the defendant deliberately waived a competency hearing by failing to make a timely request during trial. The Court responded: "But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have this court determine his capacity to stand trial." *Id.*

The court below has "overextended" this holding. See, *Jones v. Barnes*, 463 U.S. 745, 750 (1983). In Texas, if the defendant does in fact receive a competency hearing but fails to request that the hearing be separate from the trial on the merits, he has not waived the right to complain later of the

failure to give him a *separate* hearing. *Ex parte Locklin*, 583 S.W.2d at 788.[7]

The holding from *Pate* quoted above is designed to preclude the incongruous and fundamentally unfair result that would ensue if an incompetent defendant were personally required to announce his own incompetence. This would put an impossible burden of assertiveness on the incompetent defendant. However, once the issue of incompetence has been made known to the trial court, the protections of *Pate* are set in motion, and no burden falls on the accused himself. At that point it should be the duty of *counsel* to make the decision whether the competency issue shall be tried separately or alongside the issues of guilt and innocence. This choice is not one of those "fundamental decisions regarding the case" which the accused must make himself. *Jones v. Barnes*, 463 U.S. at 751. It is instead a matter best left to "counsel's professional evaluation." *Id.* Unlike the substantive assertion of incompetence, it is a tactical decision of the type counsel ordinarily makes. *Strickland v. Washington*, 466 U.S. 668, 688-689 (1984).

Respondent's trial was held seven and a half months after *Pate* was decided. At that time respondent's competent counsel successfully invoked respondent's right to have his competency determined by a jury. App. 4. In the absence of a showing that counsel were unaware of *Pate* or that they fell below objective standards of reasonable professional competence, it should be presumed that counsel knowingly chose to waive respondent's right to a separate hearing on competency. See, *Strickland v. Washington*, 466 U.S. at 687-690; *Darden v. Wainwright*, 106 S.Ct. 2464, 2473-2475 (1986).

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[7]The court below relied on *Locklin* in denying relief. It is therefore reasonable to conclude that the holding of *Locklin* was the reason for that court's refusal to address petitioner's waiver claim. See *Texas v. Brown*, 460 U.S. at 732-733, n. 1.

The decision of the court below conflicts with this Court's holding in *Jones v. Barnes* and incorrectly expands the holding in *Pate*. The petition should be granted to address this conflict.

CONCLUSION

In light of the facts of respondent's case, the decision of the Texas Court of Criminal Appeals "trivializes the principle that the State may not deprive any person of life, liberty, or property without due process of law." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 22 (1978) (Stevens, J., dissenting). The procedural violation affected none of respondent's substantial rights. The error was harmless beyond a reasonable doubt, and the fact of harmlessness raises important constitutional issues for this Court: whether *Pate* error can be harmless; on what bases harm should be assessed; and whether the granting of a new trial is a proper remedy for *Pate* error which did not affect the defendant's substantial rights. Also presented is the important *Pate* issue of whether the error in failing to provide a separate competency hearing can be waived.

The issues presented are ripe for adjudication because, as the petition makes clear, this Court has not yet taken the opportunity to expressly re-examine *Pate v. Robinson* in light of the important recent due process decisions of this Court. See, *Maggio v. Fulford*, 462 U.S. at 119 (White, J., concurring).

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS

Ex Parte Rodney Gene Broadway

No. 69,836

Habeas Corpus Application from TARRANT County

OPINION

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

On October 25, 1966, applicant was convicted of the offense of rape. Punishment was assessed at life. Applicant's conviction was affirmed on direct appeal to this Court. Broadway v. State, 418 S.W.2d 679 (Tex.Crim.App. 1967).

The applicant now claims that he was denied due process of law because the issue of his competence to stand trial was submitted to the jury in the same proceeding as the issue of his guilt or innocence. The record before this Court supports the applicant's contention.

Although submission of the competency issue to the jury in the same proceeding as that which determined guilt or innocence appeared to comply fully with the statutory law existing at the time of the applicant's trial, it is now well established that the due process clauses of the State and federal constitutions mandate a hearing on the competency issue apart from the determination of guilt or innocence. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Ex parte Locklin, 583 S.W.2d 787 (Tex.Crim.App. 1979); Townsend v. State, 427 S.W.2d 55 (Tex.Crim.App. 1968); Morales v. State, 427 S.W.2d 51 (Tex.Crim.App. 1968). Further, this Court has held

that *Pate v. Robinson*, supra, will be applied retroactively. Ex parte Halford, 536 S.W.2d 230 (Tex.Crim.App. 1976).

The relief sought is granted. The applicant's conviction in cause number 72364 in the Criminal District Court No. 3 of Tarrant County is set aside. The applicant is remanded to the custody of the sheriff of Tarrant County to answer the indictment in said cause.

PER CURIAM

Delivered: June 17, 1987

Do Not Publish

MEMORANDUM AND FINDINGS OF FACT OF THE TRIAL COURT

No. C-3-1220-72364-A

Ex Parte Rodney Gene Broadway

In The Criminal District Court Number Three
Of TARRANT County, Texas

COURT'S MEMORANDUM AND FINDINGS OF FACT

Pursuant to Art. 11.07, V.A.C.C.P. and based on this court's records, the evidence before the Court, and other documentation made a part of the record in this case, the Court adopts the following Memorandum and Findings of Fact.

MEMORANDUM

Applicant has petitioned this Court for post-conviction habeas corpus relief in connection with his 1966 conviction for the offense of rape as alleged under Art. 1183, V.A.P.C. (1925). Applicant pleaded not guilty to a jury, which found him guilty and assessed his punishment at life imprisonment. The conviction was affirmed on appeal. *Broadway v. State*, 418 S.W.2d 679. Applicant now contends that he is entitled to a new trial because he did not have a separate hearing on his competency to stand trial in 1966, in violation of *Pate v. Robinson*, 383 U.S. 375, and because the court's charge on competency was improper.

FINDINGS OF FACT

1. On April 19, 1966, the Tarrant County Grand Jury indicted Applicant for rape pursuant to the 1925 Penal Code. This offense, which was alleged to have occurred on January 13, 1966, provides the basis for this post-conviction habeas corpus application.

2. On April 26, 1966, the trial court appointed two competent local attorneys to represent Applicant.

3. On May 17, 1966, Applicant's counsel filed a motion asking the Court to appoint a psychiatrist to examine Applicant. The motion was based on counsel's belief that Applicant may have been legally insane at the time of the offense and "at this time."

4. On May 27, 1966, the Court granted Applicant's motion to appoint a psychiatrist and allowed counsel to select who that psychiatrist would be.

5. Trial began on October 24, 1966. On that date, Applicant's counsel filed an affidavit of insanity alleging that Applicant was of unsound mind "at this time" and asking that the Court declare a mistrial. This was in accord with the requirements of the statute in effect at that time, Art. 46.02, Sec. 2(a), V.A.C.C.P. (1966).

6. When Applicant was arraigned on October 24, 1966, he pleaded not guilty by reason of insanity. Later that day, his plea before the jury was "Not guilty."

7. At the time of trial, the procedural law applicable to the case had been decided by the United State's [sic] Supreme Court seven and a half months earlier in *Pate v. Robinson*, 383 U.S. 375.

8. Applicant raised a bona fide doubt as to his competency at the time of his trial, as well as insanity at the time of the offense.

9. Applicant's trial was in violation of procedural due process as promulgated in *Pate v. Robinson, supra.*

10. Applicant presented evidence on the issues of competency to stand trial and sanity at the time of the offense to the same jury that decided his guilt or innocence.

11. The State presented evidence to rebut applicant's claims of incompetency and insanity to the same jury that decided applicant's guilt or innocence.

12. The evidence submitted at trial clearly established that Applicant was competent at the time of trial and sane at the time of the offense.

13. The Court further finds that the records and activity of the Applicant subsequent to trial clearly established that Applicant was competent at the time of trial and sane at the time of the offense.

14. The evidence of Applicant's guilt was overwhelming as to the Applicant's having committed the offense beyond a reasonable doubt.

15. The trial court charged the same jury that decided applicant's guilt or innocence on the issues of applicant's competency to stand trial and sanity at the time of the offense.

16. Applicant's competent counsel did not object to the court's charge. Specifically, no objection was made to the charge on competency (sanity at the time of trial) or on the inclusion of that charge in the charge on guilt-innocence.

17. The issue of incompetency was tried in accord with Texas statutory law in effect at the time of trial. The jury was charged in accord with then-existing Texas law.

18. The jury found Applicant competent (sane at the time of trial) and sane at the time of the offense. In the second part of the charge, the jury found Applicant guilty. After hearing further evidence, the jury assessed Applicant's punishment at life imprisonment.

19. On his direct appeal to the Court of Criminal Appeals Applicant made no complaint about the determination of his competency to stand trial or the manner in which this issue

was heard and submitted to the jury. Appellant's conviction was affirmed on July 12, 1967. The Court of Criminal Appeals issued its mandate October 13, 1967.

20. The trial court submitted the definitions of competency to stand trial and insanity at the time of the offense in accord with Texas statutory law in effect at that time, and those definitions were not substantially different from the definitions of those terms as used today.

21. It is possible at this time to have a procedurally correct competency hearing by utilizing the live testimony of Dr. David J. Muller as well as transcribed testimony from the trial record.

ORDER

It is therefore ordered that:

1. The foregoing Memorandum and Findings of Fact are adopted by this Court.

2. The Clerk of this Court file these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals as required by law.

3. The Clerk of the Court furnish copies of the Memorandum, Findings, and Order to the Attorney for Applicant, Robert Udashen, Founders Square, Suite 181, 900 Jackson Street, Dallas, Texas 75202, and to the Attorney for the State, David Chapman, Assistant District Attorney, 200 West Belknap, Fort Worth, Texas 76196-0201

Signed and entered this the 9 day of April, 1987.

/s/Don Leonard
Judge Presiding

VOLUMINOUS STATUTORY MATERIAL

1. Texas Code of Criminal Procedure Annotated, art. 11.07, §§ 2-3 (Vernon Supp. 1986):

Sec. 2. (a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) Whenever a petition for writ of habeas corpus is filed after final conviction in a felony case, the clerk shall transfer or assign it to the court in which the conviction being challenged was obtained. When the petition is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and send a copy of the petition by certified mail, return receipt requested, to the attorney representing the state in that court, who shall have 15 days in which it may answer the petition. Matters alleged in the petition not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the petition, any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the

state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, and hearings, as well as using personal recollection. Also, the convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the petition, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

Sec. 3. The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the petitioner to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

2. Texas Code of Criminal Procedure Annotated, art. 46.02, §§ 1-2 (Vernon 1966):

Insanity in defense or in bar

No prior trial except by agreement

Sec. 1. No issue of insanity shall be tried in advance of trial on the merits, except upon written application on behalf of the accused with the consent of the State's attorney and the approval of the trial judge.

Procedure at trial

Sec. 2. (a) At the trial on the merits, the trial court shall hear evidence on the issue of present insanity only if prior to the offer thereof there be filed on behalf of the defendant a written motion asking the court to hear evidence on such issue and requesting the court to declare a mistrial because of such insanity in the manner and to the extent provided for in this Article.

(b) When the issue of present insanity is tried, the following rules shall apply:

(1) The issue of present insanity shall be submitted to the jury only if supported by competent testimony.

(2) (a) Instructions submitting the issue of present insanity shall be framed so as to require the jury to state in its verdict whether defendant is sane or insane at the time of the trial.

(b) Instructions submitting the issue of present insanity shall also require the jury, if it finds the defendant presently insane, to state whether the defendant requires hospitalization in a mental hospital for his own welfare and protection or the protection of others.

(3) The charge shall instruct the jury that if it finds defendant is presently insane it will not consider or deliberate upon

any other issues except (a) whether the defendant should be committed to a mental hospital; and (b) whether he was sane or insane as of the time of the alleged offense, if such issue be submitted.

(c) When the issue of insanity as of the time of the alleged offense is tried, the following rules shall apply:

(1) The issue of insanity as of the time of the alleged offense shall be submitted to the jury only if supported by competent evidence tending to show that defendant was insane as of the time of the alleged offense.

(2) Instructions submitting the issue of insanity as of the time of the alleged offense shall be framed so as to require the jury to state in its verdict whether defendant was sane or insane as of the time of the alleged offense.

(3) If the jury finds the defendant to have been insane at the time the offense is alleged to have been committed, the defendant shall stand acquitted of the alleged offense.

(d) The following rules shall apply upon defendant's being acquitted by reason of the jury's returning a finding that he was insane as of the time of the alleged offense:

(1) If the jury finds the defendant to be insane at the time of trial, and it further finds that the defendant should be committed to a mental institution, the court shall enter an order committing the defendant to a State mental hospital and placing him in the custody of the sheriff for transportation to a State mental hospital to be confined therein until he becomes sane. The court shall further order that a transcript of all medical testimony adduced before the jury, shall be forthwith prepared by the court reporter and such transcript shall accompany the patient to the State mental hospital.

(2) If the jury returns a finding that defendant is sane as of the time of the trial, then the defendant shall be finally discharged.

(3) If there be no jury finding on the issue of present insanity, then the court, if the discharge or going at large of defendant be considered by the court manifestly dangerous to the peace and safety of the people, shall order defendant committed to jail or other suitable place pending the prompt initiation and prosecution by the attorney r the State or other person designated by the court of appropriate civil proceedings to determine whether defendant shall be committed to a mental institution, or the court may give defendant into the care of his friends on their giving satisfactory security for his proper care and protection; otherwise, defendant shall be discharged.

(e) Where the jury finds that the defendant is presently insane, but does not find that he was insane at the time of the offense (either because such issue was not submitted or because the jury failed to find on that issue or because it found that he was not insane at such time), the court shall enter a mistrial as to all issues except the issue of present insanity. If the jury finds that the defendant should be committed to a mental institution, the proper order so committing him shall be entered by the court.